STATE OF MICHIGAN

COURT OF APPEALS

BARBARA STANISZ,

Plaintiff-Appellee/Cross-Appellant,

v

FEDERAL EXPRESS CORP,

Defendant-Appellant/Cross-Appellee.

and

DENNIS MARKEY

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 15, 2003

No. 236371
Saginaw Circuit Court
LC No. 99-029224-CZ

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Defendants, Federal Express Corporation and Dennis Markey, appeal as of right an opinion and order, and remittitur, following a jury verdict, in favor of plaintiff, Barbara Stanisz in this sex discrimination, sex harassment, retaliation, and assault claim. Plaintiff appeals as of right the remittitur. We affirm in part and reverse in part.

I. Substantive Facts

Plaintiff began her employment with defendant corporation on April 8, 1990 as an operations manager for the Ann Arbor location managing and supervising couriers. Plaintiff consistently received above average performance reviews and received her first promotion in September 1993 when she became station manager of the Muskegon station. Plaintiff accepted a second promotion in September 1995 after she accepted an offer to become senior manager of the Midland, Bay City, Saginaw (MBS) location of defendant corporation.

When plaintiff started at the MBS location, Markey was a courier at the location. Plaintiff soon became aware that Markey had a problem with her abilities and her position in management. Markey was argumentative, did not follow direction, and made numerous

comments about her, and women in management in general. Some of Markey's comments according to plaintiff are as follows:

> "[Plaintiff] had no business being the senior manager, [] they only put a woman in there to satisfy all the other crying women in the station and [] [plaintiff] didn't deserve the job and did not belong in it."
>
> "[H]e didn't have to listen to me because I was a woman, and, again, I did not deserve the job; that he didn't have to listen to women anyway."
>
> "[Y]ou don't have to listen to her. You don't have to take those stops. I'm not taking these stops. She told me I had to take them, all right? You don't have to listen to her. She's just a woman."

On one occasion Markey approached plaintiff to complain about a "performance reminder," a form of discipline, that he had received from his direct supervisor, for deviating from his delivery route and leaving his truck unattended that day. When plaintiff questioned Markey about the deviation, he stated that he had to seek medical attention. Plaintiff asked Markey if he had medical documentation for the visit to the doctor's office. Markey responded by telling plaintiff that he had a problem with his penis. He then said he was going to show her and then drew a picture of his penis with a vein on top of it, and explained that the vein was enlarged. Plaintiff responded stating that she was not a doctor, did not need to see the picture, and preferred that he just provide some sort of documentation for the visit. He then stated that plaintiff "wouldn't understand this anyway" because she did not have a penis, and that she could not understand how important his penis was to him. Markey never provided any medical documentation for the unscheduled stop.

Markey's attitude and comments got progressively worse in late 1997 through early 1998. Markey made more frequent comments to plaintiff that he did not have to do anything she told him to do since she was just a "helpless female," and that she did not know who was "really in charge." He also said that he was going to have her job, and that she was "just a stupid woman." During this time plaintiff also received complaints from other female employees at the station regarding Markey. Female couriers at Markey's level stated that Markey was loud, rude, and aggressive and as a result they felt intimidated by his behavior. He made comments to his female coworkers such as, "you're at my mercy, you have to take what I give you, I'm the one that's in control here."

Plaintiff contacted Patrick Passanante, the senior manager for personnel of the Michigan District and the Central Region of defendant corporation. Plaintiff described Markey's behavior, and also identified two female couriers who had also lodged complaints about Markey to plaintiff. Plaintiff relayed exchanges that she had had personally with Markey in an attempt to explain that Markey was rude, did not follow direction, and did not respect her at all. The initial discussion between plaintiff and Passanante lasted about two and a half hours. Following the original discussion, plaintiff contacted Passanante repeatedly explaining that she was familiar with defendants' employee handbook and believed Markey's behavior was inappropriate and created a hostile work environment for women in the workplace.

Passanante took no action and refused to cooperate with plaintiff despite her repeated communications with him about Markey's conduct. Passanante told plaintiff that she was an "overbearing woman" and eventually told her that she "had better be worried about [her] own conduct rather than [Markey's], that if there was anybody that was the problem it was [her]; that he didn't care to hear about [her] complaints. As far as he was concerned, [plaintiff] was the problem, and that he wasn't . . . even going to bother investigating them."

Around August 1997, plaintiff's manager changed and became Mike Reed. Plaintiff's first performance review under Reed occurred in September 1997, and her score was 3.0/4. During this time Markey continued to receive disciplines for his behavior from his supervisor, and he began filing GFT's[1] to challenge the disciplines. Reed and Passanante addressed Markey's complaints through the normal chain of command. In her role as senior manager plaintiff did not issue disciplines to Markey or handle the GFT's that he filed, but she did attempt to have conversations with Markey pursuant to an unwritten program of defendant corporation called "frank and open discussions," but he would not come into her office. Markey told plaintiff that he would not talk with plaintiff and would not sign anything unless Passanante reviewed it first.

In the beginning of 1998, Matthew Thornton became defendant corporation's regional vice president, who was one level above Reed. Plaintiff had a leadership evaluation in April 1998, and scored a seventy-three on the leadership index, an above-average score. Plaintiff also received a 4.0/4.0 on her leadership average score which Reed characterized as definitely a favorable score. Plaintiff received a commendation from Reed in April 1998 for the performance of the MBS station. In connection with the commendation, plaintiff received a performance-based payment. Plaintiff received another commendation from Reed due to results in several critical areas of the station together with a second performance-based payment in May 1998. In the commendation letter, Reed thanked plaintiff for her leadership, dedication, and contribution to the success of the Michigan district. Plaintiff was also recognized in May 1998 by Dave Rebholtz, the senior vice-president of defendant corporation, when he publicly commended plaintiff for her dedication to public service and leadership at the annual meeting for the central region managers. Plaintiff again received another bonus check for her performance.

In July 1998, plaintiff was in the warehouse when she was near Markey's workstation. Plaintiff attempted to give Markey guidance and he refused to listen to her, got very upset, and started hollering at plaintiff. Plaintiff turned around and started walking away from Markey. As she walked away, plaintiff looked back because Markey's yelling was getting louder, and she saw Markey running after her with his fist in the air still yelling. Plaintiff was afraid because she thought he was going to knock her over or strike her. Two men stepped next to her and Markey stopped approaching but kept hollering at plaintiff. Plaintiff told Markey to get in his truck and drive and then left the warehouse and went to her office where she felt safe.

Plaintiff called her immediate personnel representative, Dan O'Brien, who reported to Passanante, and told him what happened with Markey. Plaintiff also told him that she thought

[1] "GFT" stands for "guaranteed fair treatment" and is the first step in filing a grievance procedure at defendant corporation to begin the grievance process.

things were getting out of control and that she dealt with the situation for a year and now no longer felt safe. O'Brien said there was nothing he could do and that she had to call Passanante. Plaintiff called Passanante and again explained the situation. Passanante told plaintiff that she just had to put up with it and he would not come out and investigate. Plaintiff believed that Passanante felt she was at fault. After plaintiff reported the incident, Markey's comments and behavior did not change.

In September 1998, a conference call took place with plaintiff, Passanante, Thornton, and Reed to discuss issues surrounding the timing of Markey's performance review as well as issues raised by Markey in the GFT process. Thornton began the call by outlining Markey's issues. Plaintiff began to explain her point of view when Thornton cut her off. In a loud voice, Thornton stated that he and Passanante believed she was "a controlling woman," and that she "was the problem and he didn't want to hear any of [her] explanations." Thornton and Passanante would not allow plaintiff to explain anything. At one point during the call, plaintiff requested that her personnel representative, O'Brien, be allowed to participate in the conference call. Thornton denied plaintiff's request.

Plaintiff was very upset after the call and did not report to work the following day. However, she sent an email from her home to Reed relaying her feelings and stating that she believed there was some "legal exposure" since she had attempted to report what she believed to be a hostile work environment. A few days later plaintiff attended a meeting with Reed in Farmington Hills. The meeting consisted of a discussion about the conference call as well as plaintiff's annual performance review where she scored a 3.2/4.

The following day when plaintiff returned to her office she received a letter from a female courier. The letter raised several concerns surrounding Markey and his "defiant and challenging" conduct and criticized those above plaintiff in management for tolerating his instigating and antagonistic behavior. Reed came to Saginaw to meet with plaintiff the following day and asked plaintiff if she helped the female courier write the letter or was in any way involved with writing the letter. Plaintiff denied any involvement and stated that she had not even been in the office most of the previous week.

Reed informed plaintiff that Thornton believed otherwise and that he had to suspend plaintiff. Reed gave plaintiff a letter explaining that she was on investigative suspension to determine if she violated acceptable conduct policy or demonstrated leadership failure. Reed believed Thornton's directive to suspend plaintiff was "political in nature" because she continued to complain about Markey.

Plaintiff was never allowed to go back into the station after that day. Plaintiff cooperated with the investigation and met with Eric Plunkett, who had been assigned to investigate plaintiff, twice at a restaurant. Plunkett questioned her about her alleged involvement in the female courier's letter, conditions at the station principally involving Markey, and also about Passanante and plaintiff's beliefs that he had not supported her efforts to discipline Markey and that he let the station become out of control.

While still suspended, in October 1998 plaintiff filed an internal GFT EEO complaint stating that she believed she had been discriminated against. Shortly thereafter, plaintiff received a letter from defendant corporation stating that it was her right to utilize the internal EEO

process, the corporation would do a full investigation of her allegations, and that she would be protected from retaliation. Mary Norris contacted plaintiff and stated that she had been assigned to investigate her complaint, and requested plaintiff meet her for a meeting, but never got back with her and they never met.

Sometime after the suspension Reed forwarded an email to plaintiff that had originated about two weeks before plaintiff was suspended. The content of the email was Reed's response to an inquiry from Thornton asking Reed to identify senior managers in Michigan that he believed had high potential to move up to a managing director position. Reed had responded to Thornton's request with three names out of about twenty to twenty-five potential candidates, and one of the people was plaintiff.

In the beginning of November 1998 Reed informed plaintiff the investigation was complete and she was being demoted because a leadership failure had been identified. Plaintiff had two options, either accept a six-month severance package, or be demoted to an operations manager position in the Farmington Hills office. Plaintiff inquired about moving expenses since she lived in Saginaw approximately one hundred miles from the Farmington Hills office. Reed stated that since it would be a demotion defendant would not pay any moving expenses and that she would also receive a cut in pay. Plaintiff wrote a letter to Reed indicating that neither of the options were acceptable because she believed she was the person who had been threatened and intimidated in the workplace.

Plaintiff sent a letter to Ted Wisey, defendant corporation's CEO at the time as well as Rebholtz, the senior vice-president of defendant corporation informing them about her complaint and inquiring about the status of the investigation she requested. Plaintiff received a response letter from Rebholtz stating that the investigation was complete and that she had two options to consider, and that he would not be involved in her EEO complaint.

In late November 1998 plaintiff received a letter stating that she officially demoted to the Farmington Hills office and she was to report there for work two days later. Plaintiff contacted Reed's office requesting two more days off in order to make arrangements for her two teenage daughters due to the length of the drive to Farmington Hills, and to handle doctors' appointments. Plaintiff was being treated for issues related to stress stemming from the work related issues by her personal physician and a counselor.

Plaintiff was told that she could take two days off, but that she now had to report to the Romulus station rather than the Farmington Hills station. Plaintiff faxed a letter to Reed informing him that she would not be reporting to the Romulus office since it was approximately 137 miles, meaning over a two and a half hour drive, one-way, from her home. In response, plaintiff received a letter from Reed stating that she was terminated.

Plaintiff received a letter in late December 1998 regarding her internal EEO claim stating that the evidence did not substantiate her allegations of discrimination. Plaintiff was never interviewed or questioned by anyone about her claim before or after receiving this letter.

Plaintiff began to seek employment after she was terminated by defendant by sending out résumés and letters. She used the paper, contacted management recruiters, executive recruiters, and performed internet searches. By August 1999 plaintiff still had not obtained employment

and she believed that she could no longer afford her house in Saginaw and could not afford to support her children and guarantee stability in their lives. After spending the summer with him, plaintiff's children went to live were their father in Massachusetts. Plaintiff felt her life was a wreck at that point, she had lost her career, and the situation was forcing her to give up her children. Plaintiff felt great emotional pain. Plaintiff then called her mother, aged 71 at the time, and asked her if she could move in with her at her home in Garden City.

Plaintiff eventually found employment with Northwest Airlines, and began her new job in January 3, 2000 making $48,000 per year. Plaintiff's regular salary for eleven months of 1998 was $47,001 and her bonuses during the same time period totaled $14,147, making her total compensation for eleven months of 1998 at defendant was $61,148.

Plaintiff filed her complaint in this action alleging sex discrimination and harassment based on sex, retaliation, and assault. After surviving defendants' motion for summary disposition the case proceeded to trial before a jury. The jury found in favor of plaintiff on all counts and awarded her $96,000 in past lost wages, $342,000 in future lost wages, $1,000,000 in past mental anguish damages, $500,000 in future mental anguish damages, and finally, $25,000 in damages for assault. The total award was $1,963,000. The trial court awarded reasonable attorney's fees to plaintiff in the amount of $83,238.75 and costs pursuant to the ELCRA in the amount of $8,100. The trial court also denied defendants' motion for JNOV, or for new trial, but partially granted defendants' motion for remittitur, and reduced the jury award for past and future noneconomic damages from $1,500,000 to $600,000. Plaintiff accepted the remittitur. This appeal and cross-appeal followed.

II. Motion for Summary Disposition

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Meyer v Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue of material fact. *Maiden, supra*; *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

Plaintiff alleges sex discrimination in violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. On appeal, defendant argues that plaintiff failed to establish her claim for sex discrimination because plaintiff did not prove disparate treatment by direct or indirect evidence. Further, defendant argues that plaintiff did not establish a prima facie case of sex discrimination to survive summary disposition because she did not demonstrate that she was treated differently from comparably situated persons who were not members of the protected class.

In its order denying summary disposition, the trial court did not make a finding regarding disparate treatment established by direct evidence. Disparate treatment claims may be established under ordinary principles of proof by the use of direct or indirect evidence. *Wilcoxon*

v Minnesota Mining & Mfg Co, 235 Mich App 347, 359; 597 NW2d 250 (1999). "Direct evidence" is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001); *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

If, however, no direct evidence of discrimination can be produced, in order to avoid summary disposition the plaintiff must then proceed according to the prima facie test espoused in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which has been adopted in modified form and reaffirmed by the Michigan Supreme Court in *Town v Michigan Bell Telephone Co*, 455 Mich 688, 689; 568 NW2d 64 (1997) and *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-178; 579 NW2d 906 (1998). See *Hazle*, *supra* at 462; *Wilcoxon, supra* at 359. "'Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] defendant's discriminatory intent.'" *Harrison, supra* at 610, quoting *Blalock v Metal Trades, Inc*, 775 F2d 703, 707 (CA 6, 1985). Direct evidence of discrimination removes the case from *McDonnell Douglas* because the plaintiff no longer requires the inference of discrimination provided by the "presumptive" prima facie case. *Id.*

Here, plaintiff argues that she presented direct evidence of disparate treatment based on her own affidavit and deposition testimony from Reed, the managing director of the Michigan District. Plaintiff stated in her affidavit that Passanante, the personnel manager in charge of the region and Thornton, a vice-president, made repeated comments to her that she was a "controlling female," and that she was just an "aggressive female," and that she was the problem and not Markey. Plaintiff stated that Thornton told her that he and Passanante believed that she "was one of those over aggressive females," accused her of "persecuting" Markey, and "threatened" her stating that she "better change [her] ways" and told her that he "did not ever want to see another piece of paper regarding Dennis Markey cross his desk." They refused to take any action, or even investigate Markey's conduct despite plaintiff's constant complaints about his hostile behavior.

Plaintiff also presented corroborating deposition testimony from Reed stating that Markey's conduct was aggressive and "nasty" toward women in general and women in management especially plaintiff, and that Markey blatantly used words to describe plaintiff such as "bitch." Reed further stated that despite being aware of Markey's conduct, Thornton and Passanante refused to take action and instead were aggressive with plaintiff and "wanted her out."

We find that plaintiff has presented direct evidence of sex discrimination in this case. In *Harrison, supra*, this Court stated that where the plaintiff had testified in a deposition that the defendants' employees had made derogatory remarks about her race, this constituted direct evidence of discrimination. *Harrison, supra*, 225 Mich App 610. In this case, defendants claim that plaintiff was discharged because of a leadership failure. Because there is also direct evidence of sex discrimination in this case, plaintiff has met the initial burden of proving that the illegal conduct was more likely than not a substantial or motivating factor in defendants' adverse employment decision regarding plaintiff. *Id.* Since plaintiff has established sex discrimination based on a clear showing of direct evidence, she need not establish a prima facie case of sex

discrimination. *Harrison, supra* at 610 The trial court did not err when it denied defendants' motion for summary disposition on the issue of sex discrimination.

Defendants also argue that plaintiff failed to establish a case of hostile work environment sex harassment to survive summary disposition. ELCRA prohibits an employer from discriminating because of sex, which includes sexual harassment. MCR 37.2202(1); MCL 37.2103(i); *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 471-473; 652 NW2d 503 (2002). In this case, plaintiff's sexual harassment claim against defendant is based on a hostile work environment. MCL 37.2103(i)(iii) provides:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

In order to demonstrate a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior. [*Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993); *Jager, supra,* 252 Mich App 472-473.]

Our Supreme Court recently interpreted MCL 37.2103(i) in *Haynie v State of Michigan*, ____ Mich ___; ___ NW2d ___ (#120426, rel'd 6/11/03) slip op p 2, 8, 12-14. Our Supreme Court stated that the third element of a hostile work environment claim is derived from MCL 37.2103(i). *Id*. at 8. The Court held that:

> The CRA prohibits sexual harassment, which is defined in that act as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature . . . ." MCL 37.2103(i). Accordingly, conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment as that term is clearly defined in the CRA. *Id*. at 2.

The Court elaborated, stating:

> The proper recourse for conduct or communication that is gender-based, but not sexual in nature, is a sex-discrimination claim, not a sexual harassment claim. *Id*. at 2 fn 2.

Here, plaintiff provided her own affidavit stating that throughout her entire tenure as senior manager at defendant, Markey was problem for her and other female employees at the station. Plaintiff stated that Markey made comments stating that she was only put in her job because she was a woman and that she needed to "shut up all the other crying women in the station." Plaintiff stated that Markey's behavior became more abusive and more derogatory during the last six months of her employment, March 1998 through September 1998. Markey told plaintiff that he would not listen to her because she was a woman at least twelve times, he stated that he would never listen to a woman, routinely referred to plaintiff as "bitch" and to Parker as, "that other bitch," and shouted at plaintiff using profanity in the presence of other employees. Markey also physically intimidated plaintiff.

Reed's deposition testimony supported plaintiff's assertions. Reed stated that Markey referred to plaintiff as "bitch," made chauvinistic remarks, used very foul and rude language, and was very aggressive, confrontational, and nasty. Reed stated Markey thought plaintiff "was on a power trip because she's a woman. He felt it was more difficult working for a female." Reed did not receive complaints from any of the other hourly employees aside from Markey.

After reviewing the record, although we find the treatment suffered by plaintiff to be deplorable, the conduct or communication at issue was gender-based but was not sexual in nature. *Haynie, supra*, at 2. Hence, in applying *Haynie*, we must reverse the trial court's denial of summary disposition on the issue of sexual harassment.

Defendants next argue that plaintiff failed to establish a case of retaliation. MCL 37.2701(a) states that a person shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act."

Defendants have mischaracterized the facts of the case when they argue that plaintiff's retaliation claim was based solely on the internal EEO complaint she filed on October 15, 1998. Plaintiff complained about discriminatory treatment, derogatory comments, workplace violence, and the hostile work environment created by Markey between the period of March 1998 through September 1998. Plaintiff also complained to personnel about Markey's derogatory comments and the hostile environment he created on several occasions, and notably, plaintiff complained directly to both Thornton and Passanante during the conference call. Plaintiff presented evidence that Thornton "threatened" her stating that she "better change [her] ways" and told her that he "did not ever want to see another piece of paper regarding Dennis Markey cross his desk" during the same conference call. Plaintiff was suspended, and an investigation started, just over a week after the conference call where she attempted to voice her concerns directly to Passanante and Thornton. We find that plaintiff has presented evidence sufficient to establish a genuine issue of material fact with respect to her retaliation claim.

III. Motion for JNOV

We review a trial court's decision on a motion for JNOV is novo. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000); see also *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998), and *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999), but see *Anton v State Farm Mutual Ins Co*, 238 Mich App 673, 683; 607 NW2d 123 (1999). In reviewing the decision, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge, supra; Kallabat v State Farm Mutual Automobile Ins Co*, ___ Mich App ___; ___ NW2d ___ (#230627, rel'd 4/3/03) slip op p 2.

If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence fails to establish a claim as a matter of law will a JNOV be appropriate. *Forge, supra*; *Chiles, supra*. Moreover, a JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Craig v Oakwood Hospital*, 249 Mich App 534, 547; 643 NW2d 580 (2002) (Cooper, J, concurring).

In its opinion and order denying defendants' motion for JNOV, the trial court stated as follows:

> Defendants raise a number of liability issues, the most central being the sufficiency of the evidence to support the verdict. Liability in this case was premised upon three theories. One, that plaintiff was suspended, demoted, terminated, or constructively discharged, and that sex was one of the motives or reasons which made a difference in that decision. Second, that she was the subject of sexual harassment that substantially interfered with her employment or that had the purpose or effect of creating an intimidating, hostile, or offensive employment environment. Third, that Federal Express retaliated against her because she voiced her opposition to what she reasonably perceived to be discriminatory acts and/or sexual harassment. The jury found for the plaintiff on all three theories. The Court finds no sound basis to overturn that decision. There is no need to repeat here the trial testimony supporting the jury determination. Suffice it to say, more than ample evidence was presented to support the jury finding of liability against Federal Express on all three theories as well as liability against defendant Markey for the assault.

Defendants argue that the trial court erred when it denied defendants' motion for JNOV where at trial plaintiff did not make the factual showing necessary to establish her claims. In reviewing the evidence in the light most favorable to plaintiff, our review of the record reveals that plaintiff only enlarged the record at trial. Further, defendants admit in their brief on appeal that, "[a]t trial, [p]laintiff's testimony regarding her employment with FedEx was consistent with her deposition testimony."

After considering the trial testimony, it is clear that plaintiff presented direct evidence of sex discrimination at trial. Reed stated that plaintiff was not treated in the same manner as other male senior managers in his district. Plaintiff presented evidence of management's, namely Passanante's and Thornton's awareness of and tolerance for Markey's blatantly derogatory

conduct and behavior, while at the same time presented evidence of their disdain for her, without any investigation of Markey's conduct. Vitally, Thornton specifically told plaintiff that he and Passanante believed she was a "controlling woman" in the conference call. Moreover, she presented evidence that without investigation, Thornton and Passanante wanted her out and directed Reed to take adverse employment action against plaintiff. Defendants claim that plaintiff was discharged because of a leadership failure. However, plaintiff presented ample direct evidence of sex discrimination. Plaintiff established that sex discrimination was more likely than not a substantial or motivating factor in defendants' employment decisions and showed a nexus between Thornton's comment about her sex during the conference call and his decision to have her placed on investigative suspension after the conference call about Markey and receiving Fox's letter about Markey.

Viewing the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party, clearly reasonable jurors could have honestly reached different conclusions on the issue of sex discrimination, thus the jury verdict must stand. *Forge, supra; Kallabat, supra,* ___ Mich App ___; *Central Cartage Co, supra,* 232 Mich App 524. Therefore, the trial court did not err when it denied defendants' motion for JNOV on the issue of sex discrimination.

Defendants argue the trial court erred when it denied defendants' motion for a JNOV on the issue of sexual harassment. At trial, plaintiff presented testimony that Markey regularly referred to plaintiff as a "bitch" and made "references toward her gender." He constantly berated plaintiff and complained about her to Reed. Markey was aggressive when dealing with is female coworkers including plaintiff and was especially hostile toward her. Markey stated that he would not listen to plaintiff or follow direction from her because she was a woman. Upon plaintiff's questioning Markey about his whereabouts after Markey had deviated from his delivery route, Markey drew a picture of his penis and showed it to her explaining that he had an enlarged vein and sought medical attention for it, and further stated that she would never understand how important a penis is to a man. Markey also made comments such as the following about women and women in management, "when women are on their period . . . they're emotional, they're not rational, they overact."

After reviewing the record we do not find the conduct or communication at issue sexual in nature, but rather gender-based. *Haynie, supra*, at 2. Although Markey drew a picture of a penis and presented it to plaintiff, there was never any characterization that this action was intended as a "sexual advance," or any type of sexual communication, but rather as another of Markey's attempts to shock and demean plaintiff as a woman. Hence, in applying *Haynie*, we must reverse the trial court's denial of JNOV on the issue of sexual harassment.

Defendants next argue that plaintiff failed to establish a case of retaliation at trial. We find that plaintiff established at trial that she complained verbally about discriminatory treatment, derogatory comments, workplace violence, and the hostile work environment created by Markey between the period of March 1998 through September 1998, to personnel, and directly to Passanante, and later Thornton. Plaintiff established that she complained to both Thornton and Passanante during the conference call. Thornton stated that he and Passanante believed she was "a controlling woman," and that she "was the problem and he didn't want to hear any of [her] explanations." Thornton in effect threatened her stating that, "you're the problem and you need to change your ways." Thornton would not investigate the Markey situation, and instead commanded him to "aggressively take action against [plaintiff.]"

The record establishes that plaintiff was suspended, and an investigation started just over a week after the conference call where she attempted to voice her concerns directly to Passanante and Thornton. Defendants also argue that plaintiff only complained to Passanante and never established that Passanante was a decision-maker. This argument fails for two reasons. First, because the record clearly establishes that plaintiff complained to both Passanante and Thornton. Second, a decision-maker in the context of "actual notice of harassment" is defined as "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 622; 637 NW2d 536 (2001). Plaintiff established at trial that Passanante was the senior manager for personnel of the Michigan district and the central region of which both plaintiff and Markey were employed. Clearly in his role as head of personnel, two levels above plaintiff and four levels above Markey, Passanante "possess[ed] the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining" Markey. *Sheridan, supra,* 247 Mich App 622. We find that plaintiff has presented evidence sufficient proving that she established a genuine issue of material fact with respect to her retaliation claim at trial.

Defendants also argue that plaintiff failed to establish a case of assault because she did not prove the elements of assault. "An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances which create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented." SJI2d 115.01, citing *Tinkler v Richter*, 295 Mich 396; 295 NW 201 (1940). The testimony at trial established that defendant Markey approached the plaintiff in a menacing way by running after her while hollering at her and shaking his fist. Plaintiff was scared for her safety and it took two men inserting themselves into the situation to stop Markey's advances toward plaintiff, even at this point, Markey continued yelling. We find that there was ample testimony to support the jury's determination that Markey assaulted plaintiff.

IV. Damages and Motion for Remittitur

Initially, because of our reversal of plaintiff's sexual harassment claim in light of *Haynie*, *supra*, we must first address the issue of damages. Plaintiff proceeded on three distinct theories of liability against defendant Federal Express: (1) sex discrimination, (2) sex harassment, and (3) retaliation. Our review of the record indicates that the manner in which the case was submitted to the jury makes it impossible to separate the bases of liability with respect to damages. Defense counsel did not object to the special verdict form that required findings on all three theories but did not separate out damage determinations per claim, or request a verdict form that required separate damage determinations per claim. In fact, after closing arguments, prior to instructing the jury, the trial court asked counsel for both parties if they had any comments regarding the jury instructions which included the special verdict form. Defense counsel made one comment regarding one of the instructions but did not object or make any comments about the special verdict form. Furthermore, when the trial court completed instructing the jury, upon questioning from the court, defense counsel explicitly stated that he had no objections to the jury instructions including the special verdict form.

MCR 2.516(C) provides that a "party may assign as error the giving of or failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict." MCR 2.514(A) states that if a special verdict form is required, the trial court shall settle

the form of the verdict in advance of argument and in the absence of the jury. As such, we find that defendants have waived any claim of error concerning the apportionment of damages.

Our Supreme Court distinguished waiver and forfeiture, stating, "[w]aiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right." *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001) (internal citations omitted). The Court went on to explain the different effects of waiver versus forfeiture. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish the error." *Id*. Therefore because defendant specifically stated it had no objection to the jury instructions and special verdict form, we find that it has waived review of any issue regarding the apportionment of damages claim. Because waiver has extinguished any error, we affirm both the economic and noneconomic damages[2] award in total despite our reversal of one of the three theories of recovery.

Moving on to our discussion of the remittitur, in order to preserve the argument that a verdict was excessive, a party must move for remittitur or new trial, or object to the jury instruction on damages. *Peña v Ingham County Road Comm*, 255 Mich App 299, 315; 660 NW2d 351 (2003). This issue is only partially preserved for appeal because although defendants moved for remittitur in the lower court, defendants did not raise the issue of plaintiff's non-entitlement to lost insurance benefits before the trial court.

A trial court's decision regarding remittitur is reviewed on appeal for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989); *Craig, supra*, 249 Mich App 566-567; and see MCL 600.6098(4). The trial court, having witnessed the testimony and the evidence as well as the jury's reactions, is in the best position to evaluate the credibility of the witnesses and make an informed decision, and thus due deference should be given to the trial court's decision. *Palenkas, supra* at 534; *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). This Court must consider the evidence in the light most favorable to the plaintiff when reviewing the trial court's exercise of discretion regarding remittitur. *Deihm, supra*, 213 Mich App 405.

A trial court may grant a new trial when the damage award is excessive. MCR 2.611(A)(1)(c) and (d). However, if the only error is the excessiveness of the verdict, the trial court may deny a new trial if the nonmoving party consents to entry of judgment in an amount

[2] We note that as it relates to economic damages, even in the absence of defendant's waiver of the issue, remand on the issue of economic damages would not be required since the jury found in favor of all three theories of recovery, any one of which would support the award of economic damages in its entirety. Moreover, because the same conduct gave rise to the noneconomic damages, regardless whether that conduct was labeled sex discrimination or sexual harassment, the entire damage award is supported despite our reversal of the sexual harassment claim.

that the trial court finds to be the highest amount supported by the evidence. MCR 2.611(E)(1). An appellate court may not disturb a trial court's ruling in this regard absent an abuse of discretion. *Palenkas, supra,* 432 Mich 533; *Craig, supra,* 249 Mich App 539. Although the trial court should consider a number of factors, such as whether a verdict was induced by bias or prejudice, the trial court's inquiry should be limited to objective considerations related to the actual conduct of the trial or the evidence presented. *Palenkas, supra,* at 532; *Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 416; 516 NW2d 502 (1994).

The test for remittitur requires a court to examine whether the evidence submitted will support the jury award. *Deihm, supra,* 213 Mich App 404. In cases of remittitur, a court may lower the jury's determination of damages as a matter of law only after determining that the award is unsupported by the evidence introduced at trial. See *Szymanski, supra,* 221 Mich App 431. Although some opinions make fleeting reference to comparable jury awards, the core analysis must focus on the evidence in the case at bar. *Knight v Gulf & Western Properties, Inc,* 196 Mich App 119, 131-132; 492 NW2d 761 (1992).

Here, the trial court found as follows regarding past and future lost wages, bonuses, and fringe benefits:

> [T]he court again finds no sound basis to challenge or overturn the $438,000.00 jury award for past and future lost wages, bonuses, and fringe benefits.

However, the trial court did reduce the jury's award of $1,000,000 for past noneconomic damages and $500,000 for future noneconomic damages to a total of $600,000 for past and future noneconomic damages. The trial court believed the noneconomic damages awarded by the jury were "grossly excessive and tainted by a desire to punish defendant." Thus the trial court stated:

> After careful consideration, the Court finds that the evidence presented would support a total award for past and future non-economic damages in the amount of $600,000. The Court, in arriving at this figure, has given considerable deference to the jury award for past emotional distress damages, particularly given plaintiff's year long search for employment, the problems with her children, and the egregious actions of defendant which undoubtedly caused significant stress, anger, humiliation, etc. Considerably less deference was given to the award of future emotional distress damages. Finally, while this was not the dominate [sic] consideration, the Court, in arriving at this figure, did attempt to reach some reasonable balance between economic damages and non-economic damages.

Defendants argue that the trial court should have vacated plaintiff's award for future lost wages because plaintiff was not constructively discharged because she presented no evidence that reinstatement was impracticable, and she was an at-will employee who could have been discharged at any time for any reason.

"[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Jacobson v Parda Fed Credit Union,* 457 Mich 318, 325-326; 577 NW2d 881 (1998), quoting *Champion v Nationwide Security, Inc,* 450 Mich 702, 710; 545 NW2d 596 (1996). A "[p]laintiff

must first establish the requisite statutory . . . harassment before a claim of additional aggravating circumstances is considered." *Radtke, supra*, 442 Mich 373 n 1. In other words, a finding of harassment is a "necessary predicate" to plaintiff's claim of constructive discharge. *Id*.

Because plaintiff has established the requisite statutory harassment, the issue is whether defendants' conduct would not be perceived by a reasonable person as so intolerable that an employee would feel compelled to resign. See *Jacobson, supra*, 457 Mich 326. We find that the harassing incidents occurred on a regular basis and some were extremely severe. In fact Markey assaulted plaintiff, called her "bitch" repeatedly, made constant complaints about women in management, and also drew a picture of his penis and showed it to plaintiff. Plaintiff attempted to work through the issues using the proper channels, and directly reporting his conduct to her superiors. Plaintiff attempted to use available remedies, but instead was maltreated and investigated for her conduct, and ultimately defendants took no remedial action to stop the harassment.

After plaintiff herself was investigated, instead of agreeing to a six-month severance package offered by defendants, plaintiff initially agreed to accept a demotion and a reassignment to the Farmington Hills station over one hundred miles from her home in order to keep her employment. After she agreed to the initial demotion and transfer, defendants then again moved the station that she was going to be assigned to Romulus, which was located over 137 miles from her home. At this point plaintiff faxed a letter to defendants stating that she could not report to the Romulus office because of the distance. In response she was terminated. Our review of the record reveals that plaintiff has shown that under the circumstances of this case, a reasonable person would have found defendants' conduct so intolerable that she would have resigned. *Jacobson, supra*, 457 Mich 326.

Defendants' argument regarding at-will employment is applicable to breach of employment contract claims and is not relevant to the discrimination claim at bar. Thus, in light of our resolution of the constructive discharge issue, and because defendants' argument regarding at-will employment is not pertinent, we find that the trial court did not abuse its discretion when it upheld the jury award for future lost wages.

Defendants next argue that the trial court should have further reduced plaintiff's award for mental anguish because she did not present evidence of "special humiliation" and did not establish a causal nexus between defendants' alleged wrongful acts and her mental anguish. Plaintiff argues on cross-appeal that the trial court erred when it substituted its own judgment for the sound judgment of the jury and abused its discretion when it granted remittitur.

"It is well established that victims of discrimination may recover for psychic injuries such as humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish that flow from discrimination." *Hyde v University of Michigan Regents*, 226 Mich App 511, 522; 575 NW2d 36 (1997). In *Howard v Canteen Corp*, 192 Mich App 427, 435-436; 481 NW2d 718(1991), overruled on other grounds by *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999), the Court stated that:

> Victims of discrimination may recover for the humiliation, embarrassment, disappointment, and other forms of mental anguish resulting from the discrimination, and medical testimony substantiating the claim is not required.

> When a verdict is within the range of the evidence produced at trial, it should not be reversed as excessive. With regard to remittitur, the only consideration expressly authorized by the remittitur court rule, MCR 2.611(E)(1), is whether the award is supported by the evidence. [Internal footnotes and citations omitted.]

Thus, defendants' argument fails because plaintiff need only present evidence that her psychic injuries flowed from the discrimination. *Hyde, supra,* 226 Mich App 522. Plaintiff presented evidence that after she was terminated by defendants she felt that she had lost her career, her home, and that the situation caused her to have to give up her children to live with their father in Massachusetts. She also could not find suitable employment quickly and suffered the stress of over a year-long job search. Plaintiff felt that her life was a "wreck" and she suffered emotional pain that has never gone away. We find that plaintiff presented evidence that her psychic injuries flowed from the discrimination. *Id.*

However, the trial court must also examine whether the evidence submitted at trial will support the jury award. *Deihm, supra*, 213 Mich App 404. The trial court should consider a number of factors, such as whether a verdict was induced by bias or prejudice, and the trial court's inquiry should be limited to objective considerations related to the actual conduct of the trial or the evidence presented. *Palenkas, supra,* 432 Mich 532; *Phillips, supra,* 204 Mich App 416.

We find that even viewing the evidence presented at trial in the light most favorable to the plaintiff when reviewing the trial court's exercise of discretion regarding the remittitur, the trial court did not abuse its discretion when it lowered the noneconomic damage award to $600,000. *Deihm, supra,* 213 Mich App 405. We recognize that the trial court, having witnessed the testimony and the evidence as well as the jury's reactions, was in the best position to evaluate the credibility of the witnesses and make an informed decision, and thus afford the trial court's decision due deference. *Palenkas, supra,* 432 Mich 534; *Deihm, supra* at 404.

After reviewing the record together with the trial court's lengthy and fact-laden opinion on this issue, we find that the trial court correctly considered several factors when making its decision including whether the verdict was induced by bias or prejudice, and moreover, limited its inquiry to objective considerations related to the actual conduct of the trial or the evidence presented. *Palenkas, supra,* 432 Mich 532; *Phillips, supra,* 204 Mich App 416.

Lastly, defendants argue that plaintiff cannot recover for lost insurance benefits because plaintiff did not present any evidence that she purchased her own insurance or that she incurred out-of-pocket expenses that would have been incurred under defendants' insurance. Defendants did not raise this issue before the trial court in their motion for JNOV or for new trial or for remittitur, thus this issue is not preserved for our review and we decline to review it. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 504 NW2d 422 (1993).

V. Motion for Costs

This Court reviews an award of costs for an abuse of discretion. *Kernan v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and

logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

MCL 37.2802 provides that "[a] court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." Defendants argue that the trial court erred when it ordered plaintiff be reimbursed for all of her litigation expenses, and not just those costs provided by statute and stated that recoverable costs are provided by statute and are set forth in MCL 600.2401 *et seq*.

Contrary to defendants' argument, "Elliott-Larsen does not differentiate between taxable costs and out-of-pocket expenses." *Lilley v BTM Corp*, 759 F Supp 1248, 1249 (ED Mich, 1991), reversed in part on other grounds, 958 F 2d 746 (CA 6, 1992). Furthermore, we have found no case law limiting the discretionary costs provided by MCL 37.2802 to "taxable costs" or "recoverable costs" as implicated by defendants. Thus, defendants' argument fails, and the trial court did not abuse its discretion when it awarded costs in the amount of $8,100. *Kernan, supra*, 252 Mich App 691.

Affirmed in part, reversed in part.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Pat M. Donofrio